
(2014) 01 TP CK 0005

In the Tripura High Court

Case No : Criminal Rev. P. No. 49 of 2008

Sri Mrinal Kanti Dey VsThe State of Tripura

Date of Decision : 24-01-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 251, 397, 401
Evidence Act, 1872 — Section 114
Penal Code, 1860 (IPC) — Section 279, 338

Citation : (2014) 01 TP CK 0005

Hon'ble Judges : S. Talapatra, J

Bench : Single Bench

Advocate : A. Bhowmik, for the Appellant; R.C. Debnath, Addl. P.P., for the Respondent

Final Decision : Allowed

Judgement

S. Talapatra, J.—Heard Mr. A. Bhowmik, learned counsel appearing the petitioner as well as Mr. R.C. Debnath, learned Addl. Public Prosecutor appearing for the state. This is a petition filed u/s 397 read with Section 401 of the Cr.P.C., questioning the legality of the judgment and order dated 21.04.2008 passed by the Sessions Judge, South Tripura, Udaipur in Criminal Appeal No. 05(2) of 2008, whereby the judgment and order dated 10.03.2008, delivered by the Chief Judicial Magistrate, South Tripura, Udaipur in G.R. No. 236/2006 has been affirmed.

2. By the said judgment and order dated 10.03.2008, the revision petitioner has been convicted under Sections 279/338 of the IPC and sentenced to suffer six months RI for each of the offences. However, it has been directed that both the sentences shall run concurrently.

3. By a complaint filed by one Narayan Chandra Majumder (P.W. 1), it has been disclosed that while he and other co-passengers including one of his nephews had been travelling by an Auto Rickshaw bearing Registration No. TR-03-3882 from Chandrapur Colony to Udaipur, in a place called Beltali, the said vehicle got turned for careless and reckless driving of the vehicle. As a result, P.W. 1 and his

nephew, namely Rakesh Majumder (P.W. 2) suffered some injuries. The injuries on P.W. 2 were grievous in nature and he was accordingly admitted in the T.S.D. Hospital at Udaipur and thereafter he has been referred to the G.B.P. Hospital, Agartala.

4. Based on the said complaint received on 04.06.2006, R.K. Pur P.S. Case No. 229/2006 was registered and taken up for investigation. On completion of investigation, the charge-sheet was filed against the petitioner and the statement of accusation u/s 251 of the Cr.P.C. was read over to him and he denied the accusation and claimed to face the trial.

5. In order to substantiate the charge, the prosecution had adduced as many as ten witnesses including the Investigating Officer, Krishnadhan Sarkar (P.W. 8), the informant, Narayan Chandra Majumder (P.W. 1) and Rakesh Majumder (P.W. 2).

6. What has been found in this case is that P.W. 7, the father of the petitioner, namely Manik Dey has categorically stated in the court that he is the owner of the Auto Rickshaw bearing Registration No. TR-03-3882 and on the relevant day and time his son (the petitioner herein) was driving the said vehicle. The said statement has been confronted in the cross-examination, but P.W. 7 did not deviate from his statement made in the examination-in-chief. Thus, the identity of the driver who had driven the said vehicle at the time of the accident has been quite adequately established by the prosecution. Apart that, the other witnesses, like P.W. 1 (Narayan Chandra Majumder), P.W. 2 (Rakesh Majumder) and P.W. 3 (Smt. Pakhi Majumder) had identified the petitioner in the dock. Though those witnesses have stated that they did not disclose the name of the petitioner to the police, but they could identify the petitioner by his face.

7. Mr. A. Bhowmik, learned counsel appearing for the petitioner has submitted that there is no element of rash and negligent driving in the evidence and, as such, both the trial court as well as the appellate court had committed serious illegality in returning the finding of conviction under Sections 279 and 338 of the IPC.

8. Both Sections 279 and 338 of the IPC have their commonality of elements for constituting the respective offences. Section 279 of the IPC provides that "Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both". Similarly, Section 338 of the IPC provides that "Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both".

9. Section 279 of the IPC provides for rash or negligent driving as to endanger

human life, or to be likely to cause hurt or injury to any other person. It thus imparts that if there is no hurt or injury, but proof of the rash driving on a public way to endanger human life or likely to cause hurt or injury, it would be adequate to punish someone u/s 279 of the IPC. Whereas sine qua non of Section 338 of the IPC is grievous hurt by the act endangering life or personal safety of others. Since the petitioner has been punished under both the Sections it is imperative on the part of the prosecution to prove rash and negligent driving on a public way and that the grievous hurt was caused by the said rash and negligent driving. It appears that except stating "the vehicle was being driven in a high speed" and that too in the upgradient of the road. No witness has stated anything else.

10. For purpose of proving the "hurt", Dr. Timir Baran Chakraborty, the Medical Officer (P.W. 9), has stated as under:

On 2.6.05 I examined one patient namely Rakesh Majumder admitted in the hospital with history of R.T.A. through Emergency Block. On examination I found the following injuries:--

1. Penetrating wound 1/4" in circumference over right thigh.
2. Fracture of shape femur.

The injury No. 1 is simple in nature caused by blunt weapon and injury No. 2 is grievous in nature caused by blunt. The patient was referred to G.B. Hospital. This is the injury prepared and signed by me marked Exbt. 6. The injury report is prepared in c/w. R.K. Pur P.S. Case No. 229/06. Such injuries may be caused due to R.T.A.

No cross-examination was carried out as regards the doctor's statement and on his introduction of the Exbt. 6 in the evidence.

11. From scrutiny of the oral testimony of P.W. 1, it appears that when the vehicle was being plied in high speed it got over-turned and as a result he and his nephew (P.W. 2) got injuries, however, he has provided certain other details as regards the accident, which reads as under:

After 5/7 days of that accident driver of the said auto rickshaw told me that 2 dogs ran over two goats which happened to come in front of his auto rickshaw and as such he lost control over the steering which tried to save the lives of the said 2 goats.

12. P.W. 2, Rakesh Majumder has replicated the statement of P.W. 1, but has not corroborated the story of saving the lives of two goats. P.W. 3, Smt. Pakhi Majumder also did not corroborate that story, however, she has replicated the statement of P.W. 1 as provided in the examination-in-chief.

13. P.W. 4, Dilip Nandi has stated that "at some upgradient of the road at Beltali at about 4/4-30 p.m., it suddenly overturned and as a result all the passengers of the said auto rickshaw sustained some or more injuries on their bodies". He

has also stated that P.W. 2 had sustained severe fracture injury in his left leg. In the cross-examination, he has stated that he heard from the local people that two dogs suddenly came in front of their auto rickshaw and as a result the accident had occurred.

14. P.W. 5, Asim Saha was the Motor Vehicle Inspector at the relevant point of time. He had examined the said auto rickshaw and found no mechanical disorder in the said vehicle and accordingly he had prepared the report (Exbt. 2).

15. P.W. 6, Suresh Chandra Das is the scribe of the complaint (Exbt. 1) and he did not disclose any material of importance.

16. P.W. 7, Manik Dey is the father of the petitioner, who has stated that the petitioner was driving the said auto rickshaw at the relevant point of time of the accident.

17. P.W. 8, Krishnadhan Sarkar is the Investigating Officer who has briefly narrated how he had recorded the statement of the witnesses, seized the material documents, prepared the hand-sketch map with separate index and collected the injury report from the Medical Officer. Thereafter, finding prima facie case established, he had filed the charge-sheet against the petitioner. P.W. 10, Pradip Sukla Das is the seizure witness of the said Auto Rickshaw.

18. Mr. A. Bhowmik, learned counsel appearing for the petitioner, has stated on referring to the relevant part of the statement which reads that "the vehicle being driven with high speed" that such bald statement can not constitute rash and negligence for purpose of offence under Sections 279 or 338 of the IPC. In this regard he has referred to a decision of the apex court in Ravi Kapur Vs. State of Rajasthan, where the apex court has dwelled on the meaning of rash and negligent driving and on materials for determining the question of negligence or contributory negligence etc. For purpose of appreciation, following passages are reproduced therefrom:

12. Rash and negligent driving has to be examined in the light of the facts and circumstances of a given case. It is a fact incapable of being construed or seen in isolation. It must be examined in light of the attendant circumstances. A person who drives a vehicle on the road is liable to be held responsible for the act as well as for the result. It may not be always possible to determine with reference to the speed of a vehicle whether a person was driving rashly and negligently. Both these acts presuppose an abnormal conduct. Even when one is driving a vehicle at a slow speed but recklessly and negligently, it would amount to "rash and negligent driving" within the meaning of the language of Section 279 IPC. That is why the legislature in its wisdom has used the words "manner so rash or negligent as to endanger human life". The preliminary conditions, thus, are that (a) it is the manner in which the vehicle is driven; (b) it be driven either rashly or negligently; and (c) such rash or negligent driving should be such as to endanger human life. Once these ingredients are satisfied, the penalty contemplated u/s 279 IPC is attracted.

13. "Negligence" means omission to do something which a reasonable and prudent person guided by the considerations which ordinarily regulate human affairs would do or doing something which a prudent and reasonable person guided by similar considerations would not do. Negligence is not an absolute term but is a relative one; it is rather a comparative term. It is difficult to state with precision any mathematically exact formula by which negligence or lack of it can be infallibly measured in a given case. Whether there exists negligence per se or the course of conduct amounts to negligence will normally depend upon the attending and surrounding facts and circumstances which have to be taken into consideration by the Court. In a given case, even not doing what one was ought to do can constitute negligence.

[Emphasis added]

19. Mr. Bhowmik, learned counsel appearing for the petitioner has further submitted that even by scientific examination the speed of the vehicle can be determined. But, in this case the Investigating Agency did not make any attempt to determine whether for "probable high speed" the accident had occurred or for any other reason despite reasonable care taken by the petitioner. To nourish his statement in this regard, Mr. Bhowmik, learned counsel has referred another decision of the apex court in Nageshwar Shri Krishna Ghobe Vs. State of Maharashtra, where the apex court in para 9 held that -

...We find there is considerable force in this submission. The High Court has also observed that no attempt had at all been made "to ascertain the probable speed of the bus by measuring the tyre marks on the road though, according to the witnesses, the brakes were jammed and there was a screaming sound as the bus came to a halt", adding, that even the elementary precaution of having the bus tested for the efficiency of its brakes was not taken. Though according to Shri Pardiwala the observation of the High Court, that, the brakes were jammed and there was a screaming sound, was not supported by evidence, in our opinion, assuming this observation to be supported by evidence, it only serves to fortify the view of the High Court that the investigation has been conducted in a very casual and superficial manner. The investigating officer seems to have acted without the requisite sense of responsibility essential for fair and just police investigation into serious accidents like the present, with the result that important evidence which was available and should easily have been forthcoming has not been brought before the court for wholly inadequate - if not flimsy - reasons. Examination of the marks of wheels on the road would have been very useful in appreciating other evidence. What is more surprising is that even evidence on the state of the traffic on the road at the relevant time and on the height of the kerb has not been produced by the prosecution. This evidence would have clearly helped the court in having a clearer picture of the position and in more satisfactorily appreciating the circumstances in which the accident occurred.

20. On taking aid from those reports, Mr. Bhowmik, learned counsel appearing

for the petitioner has submitted that the prosecution has miserably failed to establish the useful materials in the evidence for purpose of holding that the petitioner was driving the vehicle with rashness and negligent.

21. Mr. R.C. Debnath, learned Addl. Public Prosecutor appearing for the state has submitted that P.Ws. 1, 2 and 3 have stated in unison that the offending vehicle was being driven in high speed and the driver had failed to control the vehicle for such high speed. As a result, in the up-gradient the vehicle got overturned. He has emphasised that the identity of the petitioner as the driver of the said vehicle at the time of the accident has been well established and from the testimonies as referred it can be safely presumed by taking aid of Section 114 of the Evidence Act that the vehicle was being driven with rashness and negligence. Therefore, there cannot be any reason to interfere with the impugned judgment and order.

22. After appreciating the submissions of the learned counsel for the parties as well as on scrutinising the records meticulously, it appears that the P.Ws. 1, 2, 3 and 4 are not certain as to whether the accident had occurred due to high speed or not. They have merely stated that the vehicle was being plied with high speed.

23. From the attending circumstances as laid in the evidence it would appear that the vehicle was being plied towards up-gradient of the road. As a result, it cannot be presumed that the vehicle was being plied with extreme and uncontrolled speed, constituting rashness and negligence. Apart that, P.Ws. 1 and 4 have categorically stated that all of a sudden two goats having chased by two dogs had crossed the vehicle and the accident had occurred. For this, the petitioner cannot be held responsible for carelessness, negligence or rashness and as such the benefit must go to the petitioner.

24. Accordingly, the impugned judgment and order is interfered with and set aside and the petitioner is acquitted from the accusation on benefit of doubt. In the result, this petition stands allowed.

The bail bond is discharged.

Send down the LCRs forthwith.